

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH D. HUBERMAN and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Van Nuys, CA

*Docket No. 03-758; Submitted on the Record;
Issued July 14, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On May 16, 2002 appellant, a 55-year-old fraud referral specialist, filed a claim for occupational disease alleging that she developed sciatica while in the performance of duty. Appellant attributed her condition to lifting her briefcase and computer in and out of the car on a regular basis. She also stated that she usually used a luggage carrier to transport work-related items and she sometimes carried heavier files when she did not anticipate using her briefcase. Appellant first became aware of her illness on May 3, 2002, and first realized that the illness was caused by her employment on May 15, 2002. Appellant did not submit medical evidence with her May 16, 2002 claim.

By letter dated June 20, 2002, the Office advised appellant that the information she submitted was insufficient to establish that she sustained an injury as alleged. The Office requested additional factual and medical evidence and afforded appellant 30 days within which to submit the requested information.

Appellant submitted a June 30, 2002 statement in which she noted a 1981 laminectomy at L5 for a herniated disc, noting that she had sciatica at that time as well.

In a report dated May 6, 2002, Dr. Robert Gazmararian, appellant's treating physician, Board-certified in physical medicine and rehabilitation, stated that he examined appellant on May 2, 2002 for right buttock pain which radiated into the left foot. He related that appellant noted no specific injury and also made reference to her prior lumbar laminectomy. Dr. Gazmararian stated that lumbar x-rays taken that day revealed a normal spine except for a collapsing disc space at L5-S1. He diagnosed right lumbar radiculopathy, secondary to herniated disc and left lumbosacral strain.

Appellant also submitted a May 16, 2002 a magnetic resonance imaging (MRI) scan of the lumbar spine that revealed a four millimeter disc bulge at L5-S1 and a right hemilaminectomy.

In a report dated May 20, 2002, Dr. Gazmararian stated that appellant had a resolving right lumbar radiculopathy, status post right lumbar laminectomy and lumbosacral strain. He noted that her May 16, 2002 lumbar MRI scan revealed a diffuse bulge at L5-S1 with diffuse osteophyte. In a report also dated May 20, 2002, a physical therapist noted that appellant had seven physical therapy sessions in three weeks and that she had related that most of her radicular pain had resolved. In a June 6, 2002 report, Dr. Gazmararian noted that electromyogram (EMG) and nerve conduction studies indicated an S1 nerve root dysfunction with no electrophysiological evidence of right peripheral neuropathy. On June 12, 2002 the therapist stated that appellant reported increased pain since her EMG examination. On June 21, 2002 appellant underwent a lumbar epidural block and myelogram based on appellant's right sciatica secondary to L5-S1 herniated disc pulposus. Appellant was advised to report on her condition in one week.

By decision dated August 5, 2002, the Office denied appellant's claim on the basis that the medical evidence of record failed to establish that a condition had been diagnosed in connection with her accepted employment exposure.

By letter dated August 8, 2002, appellant requested reconsideration. Appellant stated that she had asked her treating physician to address what was lacking in his medical statement and that he would forward his response directly to the Office. After several telephone conversations and an exchange of correspondence between appellant and the Office, Dr. Gazmararian's report was not forthcoming.

By decision dated October 2, 2002, the Office denied appellant's request for reconsideration.

In a letter dated December 4, 2002, appellant again requested reconsideration, advising the Office that a report from Dr. Avrom Gart, also Board-certified in physical medicine and rehabilitation, would be forthcoming. No medical evidence was received. In a decision dated January 22, 2003, the Office again denied reconsideration.

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that any disability or specific condition for which compensation is claimed is causally related to his or her employment.²

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

In order to establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.³ Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁴

Appellant has failed to submit sufficient rationalized medical evidence establishing that she sustained an injury caused or aggravated by factors of her federal employment. In reports dated May 6 and May 20, 2002, Dr. Gazmararian stated that he examined appellant on both days and diagnosed right lumbar radiculopathy, later resolving and left lumbosacral strain. However, Dr. Gazmararian failed to address whether appellant's conditions were causally related to factors of her employment. He also noted in his June 6, 2002 report that appellant had an S1 nerve root dysfunction, but did not attribute this condition to her employment. This medical evidence fails to contain a rationalized opinion from the physician on the issue of causal relation. As appellant has failed to submit rationalized medical evidence establishing that she sustained an injury caused or aggravated by factors of her employment, the Board finds that she has failed to meet her burden of proof.

The Board further finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.⁵ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶

Appellant's August 8 and December 4, 2002 requests for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, *supra* note 3. Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Id.*

⁵ 20 C.F.R. § 10.606(b)(2) (1999).

⁶ 20 C.F.R. § 10.608(b) (1999).

the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any new medical evidence with either her August 8 or December 4, 2002 request for reconsideration. While appellant stated that additional medical evidence would be submitted by Drs. Gazmararian and Gart, no medical reports from either physician was submitted. Accordingly, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's August 8 and December 4, 2002 requests for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated January 22, 2003, October 2 and August 5, 2002 are hereby affirmed.⁷

Dated, Washington, DC
July 14, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Board notes that the record on appeal contains evidence that the Office received after it issued the January 22, 2003 decision denying reconsideration. The Board lacks jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); see *James C. Campbell*, 5 ECAB 35, 36 n. 2 (1952).